No. 91-1158

In The

# Supreme Court of the United States

October Term, 1991

THE STATE OF MISSISSIPPI, ET AL.,

*Petitioners,*

v.

THE STATE OF LOUISIANA, ET AL.,

*Respondents.*

**On Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Fifth Circuit**

## BRIEF FOR PETITIONERS

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether the court below erred in determining the boundary between the States of Mississippi and Louisiana.

2. Whether the court below exceeded its authority under Rule 52(a) in disregarding findings of fact by the trial court as "clearly erroneous."

3. Did the district court properly assert jurisdiction over respondent's third-party complaint against petitioner State of Mississippi?[1]

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[1] As stated by this Court in its order granting certiorari.

## PARTIES TO THE PROCEEDING BELOW

The State of Mississippi

Julia Donelson Houston (now Ehrhardt), Ruth Houston Baker, and Hines H. Baker, Jr., Co-Executors and Co-Trustees of the Estate of George T. Houston, a/k/a George T. Houston, III, Deceased

Ruth Houston Baker, Individually

The State of Louisiana

The Lake Providence Port Commission



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## OPINIONS BELOW

The opinion of the court below is reported as *Houston v. Thomas*, 937 F.2d 247 (5th Cir. 1991), and is reproduced in the Appendix to the Petition for Writ of Certiorari at 1a.[1] The trial court issued unreported bench opinions on June 23, 1989 and October 2, 1989. (Pet. for Cert. App. 19a and 50a)

## JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1) (1988). (Pet. for Cert. App. 18a) The judgment of the court below was entered on August 5, 1991. (Pet. for Cert. App. 1a) Rehearing was denied on October 22, 1991. (Pet. for Cert. App. 16a) A timely petition for certiorari was filed on January 16, 1992, and this Court granted certiorari on March 23, 1992.

## STATUTES INVOLVED

The statutes involved are 28 U.S.C. § 1251(a) (1988) ("The Supreme Court shall have original and exclusive jurisdiction of all controversies between two or more States") and 28 U.S.C. § 1331 (1988) ("The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States").

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[1] The Appendix to the Petition for Writ of Certiorari is cited as "Pet. for Cert. App. ___." The Joint Appendix filed with this Brief on the Merits is cited as "J.A. ___."

## STATEMENT OF THE CASE

This case involves the boundary between the States of Mississippi and Louisiana in the vicinity of an island located in the Mississippi River known as "Stack Island" or "Island No. 94," together with the rights of individual owners claiming title under patent from the United States and a deed from the State of Mississippi.

The island has been known to exist, or appears from evidence in the record to have existed, since the 1826-1827 era. The Houston group[2] claims under a homestead patent from the United States issued to Stephen B. Blackwell in 1888,[3] effective 1881, and a deed from the State of Mississippi issued in 1933 following a tax foreclosure. (Pl.Ex. 46; Tr. 201, 218)[4]

This case was originally brought by the Houston group in the United States District Court for the Southern District of Mississippi ("Mississippi district court" or "trial court") as a complaint to remove cloud. Louisiana sought leave to intervene as a matter of right under Rule 24 of the Federal Rules of Civil Procedure, asserting that the Mississippi district court had jurisdiction, that Stack Island was located in Louisiana, and that the island was

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[2] These are the individual landowners who were parties to the proceeding below. See *supra* at ii.

[3] The patent describes the land as being in Issaquena County, Mississippi (Pl.Ex. 41; Tr. 200, 218) as does the homestead application book. See entry dated October 25, 1881. (Pl.Ex. 40; Tr. 199, 218)

[4] Record references to the trial transcript are designated "Tr. ___" herein.



owned by Louisiana or by the Lake Providence Port Commission. (J.A. 5-8)

Following its intervention, Louisiana filed a third-party complaint against the State of Mississippi seeking a determination of the proper boundary between the States of Louisiana and Mississippi and a declaration of rights and title to Stack Island arising out of an Act of Congress approved April 6, 1812, 50 Stat. 701, admitting Louisiana as a state. (J.A. 22) Jurisdiction was asserted primarily on the ground that the controversy involved the interpretation and application of federal law. (J.A. 23-24) The complaint also alleged the existence of disputes between citizens of different states, between citizens of one state and the state itself, and between the States of Louisiana and Mississippi. (J.A. 23-24)

Mississippi answered, asserting that Stack Island was located in Mississippi pursuant to the Act admitting Mississippi to the Union, as well as the Treaty of Peace between the United States and Great Britain of September 3, 1783, 8 Stat. 80, and maintaining that the property was therefore subject to the exclusive and complete jurisdiction of the State of Mississippi. (J.A. 29)

Louisiana then sought to have this Court assume original jurisdiction under Article III, Section 2, of the United States Constitution and 28 U.S.C. § 1251(a) (1988). *Louisiana v. Mississippi*, No. 114, October Term 1988. (Pet. for Cert. App. 83a) Mississippi, together with the Houston group, urged this Court not to take jurisdiction because an alternative forum, the Mississippi district court, could determine the issues and the normal review procedure, including certiorari, would be available to any

party dissatisfied with the result.[5] (Pet. for Cert. App. 86a, 87a)

By order issued October 3, 1988, this Court denied the application for stay of the proceedings in the Mississippi district court. *Louisiana v. Mississippi*, 488 U.S. 808 (1988) (Pet. for Cert. App. 89a). Thereafter, by order dated December 12, 1988, the motion of Louisiana for leave to file a bill of complaint was denied. *Louisiana v. Mississippi*, 488 U.S. 990, 991 (1988) (Pet. for Cert. App. 91a). Rehearing was denied by order of February 27, 1989. 489 U.S. 1050 (1989) (Pet. for Cert. App. 93a).

On the motion of Louisiana, the trial court ordered the cause bifurcated for separate trials, the first trial to determine whether Stack Island was Mississippi land, the second to determine title in the event the trial court determined Stack Island did lie within the State of Mississippi. (J.A. 38-39)

The trial court found, on the extensive record in the first trial, that the boundary thalweg of the Mississippi River lay west of Stack Island in 1881, the date of the patent, and that, accordingly, the island was Mississippi land. The trial court did not refer to the undisputed testimony and documentary evidence in the record locating Stack Island east of the Mississippi River thalweg as early as 1826-1827. See Pet. for Cert. App. at 24a-34a. The trial court also reviewed the evidence of Mississippi's long-exercised dominion and jurisdiction over Stack

[5] It was also argued that the expenses involved militated in favor of permitting a decision by the Mississippi district court. (Pet. for Cert. App. 86a)



Island and found that Mississippi had established sovereignty by virtue of the Doctrine of Acquiescence. (Pet for Cert. App. 37a-41a)

Having determined the land to be in Mississippi, the trial court then heard evidence on the question of ownership and ordered that title be quieted in the Houston group. (Pet. for Cert. App. 74a, 75a)

Louisiana appealed. The Fifth Circuit reversed and rendered. It regarded the findings of the district court as clearly erroneous and made findings of its own that Stack Island was within Louisiana. In addition, the Fifth Circuit reviewed *de novo* the trial court's application of the law to the facts concerning acquiescence and found that the trial court's ruling could not be sustained. See 937 F.2d at 253-54. (Pet. for Cert. App. at 71a, 14a)

Requests for rehearing were denied. (Pet. for Cert. App. 16a) Certiorari was granted by this Court on March 23, 1992, on the questions for review set out above.

## SUMMARY OF THE ARGUMENT

This case turns on fact-findings made by the trial court with respect to the application of two doctrines, the Rule of the Thalweg, with the Island Rule exception, and the Doctrine of Acquiescence. With the exception of the jurisdiction question, the applicable rules of law are well established by decisions of this Court. Petitioners submit that the trial court had jurisdiction and that its findings control.

Whether Stack Island is located within the boundaries of Mississippi or Louisiana is to be determined by the location of the thalweg, or main downstream navigation channel of the Mississippi River, at the time Louisiana was admitted to the Union or at the time the island was formed. A subsequent change in the location of the thalweg from one side of the island to another, however gradual, does not change the sovereignty of the state over the island. *See Missouri v. Kentucky*, 78 U.S. (11 Wall.) 395 (1871). However, the long exercise of dominion by a state over disputed lands, coupled with acquiescence in such dominion, preempts the Thalweg Rule and fixes sovereignty in the state that has asserted the dominion and jurisdiction. *Arkansas v. Tennessee*, 310 U.S. 563 (1940).

By patent effective in 1881, Stack Island was patented by the United States as Issaquena County, Mississippi land. The trial court found from the evidence that at that date the boundary thalweg lay west of Stack Island. It also found, based on an extensive record, that Mississippi had exercised dominion and jurisdiction over the island land mass since 1881, a period of approximately 108 years, and that, in the event the trial court was in error in its application of the Thalweg Rule, the island had become Mississippi land under the Doctrine of Acquiescence. (Pet. for Cert. App. 40a, 41a) These findings should have controlled the outcome of this litigation.

Fact-findings made by the trial court can only be disregarded when such findings are "clearly erroneous." Rule 52(a). Where there are two permissible views of the evidence, whether they be based on testimony of witnesses or documentary evidence, the fact-finder's choice between them cannot be clearly erroneous. *Anderson v.*



*City of Bessemer City*, 470 U.S. 564 (1985). Nor is any distinction made between ultimate findings and subsidiary findings. *Pullman-Standard v. Swint*, 456 U.S. 273 (1982). If the finding is plausible in light of the record viewed in its entirety, the appellate court cannot reverse even if it would have made a different finding had it been sitting as the trier of fact. *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985).

The record here fully supports, if not compels, the trial court's findings. However, exceeding the limits of its authority under Rule 52(a), the Fifth Circuit indulged in its own fact-findings with respect to the location of the thalweg in 1881. The Fifth Circuit's opinion discloses and reviews two permissible views of the evidence based on conflicting expert opinions. This itself validates the trial court's finding and precludes a holding that it is "clearly erroneous." By offering factual rather than legal grounds for its reversal, the Fifth Circuit further confirmed that it had exceeded permissible limits in its review. See *Amadeo v. Zant*, 486 U.S. 214, 223 (1988).

The Fifth Circuit also refused to accept the findings of the trial court with respect to the Doctrine of Acquiescence. It erroneously reviewed *de novo* on the stated justification that the trial court had incorrectly applied the facts to the law. Like the thalweg issue, acquiescence *vel non* involves a pure question of fact. *Arkansas v. Tennessee*, 310 U.S. 563 (1940).

The record showed and the trial court found that prescription and acquiescence were established, *inter alia*, by the patenting of Stack Island as Mississippi land in 1881, taxing by Mississippi at least from 1889 (the year

following the issuance of the patent), the enforcement by Mississippi of its tax laws through foreclosure and sale, sale by Mississippi to the predecessors in title of the Houston group, law enforcement by Mississippi officers, the resolution of disputes in Mississippi courts, as well as the general reputation and recognition of the island as Mississippi land by persons familiar with it. The trial court further found that Louisiana had not acted to assert sovereignty or to interrupt Mississippi's longstanding exercise of dominion over the island. The only evidence claimed by Louisiana to show any assertion of jurisdiction – the passage of legislation in 1908 and activities of the Louisiana Levee District – was addressed by the trial court and found not to have been associated with Stack Island. These findings should have been accorded controlling deference.

While the Fifth Circuit could, if required, have remanded to the trial court for further findings, it was beyond its authority to substitute its own fact-findings and, based thereon, to render judgment for Louisiana. *Cf. Icicle Seafoods v. Worthington*, 475 U.S. 709 (1986).

The jurisdiction of the district court to entertain Louisiana's third-party complaint against Mississippi turns on three distinct issues. Although 28 U.S.C. § 1251(a) gives this Court "original and exclusive jurisdiction of all controversies between two or more States," it is now settled here that the Court has discretion about accepting original cases, "even as to actions between States where our jurisdiction is exclusive." *Wyoming v. Oklahoma*, 112 S. Ct. 789, 798 (1992).



In exercising its discretion whether to hear an original case, the Court considers whether the issues are clearly subject to resolution in an alternative forum. *Wyoming*, 112 S. Ct. at 798-99. Here the Court exercised its discretion and denied Louisiana's motion to file a bill of complaint in the Court's original jurisdiction. *Louisiana v. Mississippi*, 488 U.S. 808 (1988). That the Court in 1988 regarded the pending action in the Southern District of Mississippi as a suitable alternative forum does not establish that the district court had jurisdiction, but the Court was right in thinking that the district court had jurisdiction and could resolve the issues.

The jurisdiction of the district court over the original suit between private parties has never been questioned. The trial court properly allowed Louisiana to intervene in that suit on either of two bases. Louisiana asserted that its complaint in intervention raised a federal question, and it was right. A claim by a state about where its boundary is, like a possessory action by an Indian tribe, *Oneida Indian Nation of New York State v. County of Oneida*, 414 U.S. 661 (1974), must always be a matter of federal law. State boundaries are determined by Acts of Congress, by treaties to which the United States is a party, or by federal common law. Even if this were not so clearly a case of federal-question jurisdiction, Louisiana's claim in intervention would come within the ancillary jurisdiction of the district court, since the intervention was of right under Rule 24(a)(2). After Louisiana was allowed to intervene, it was properly granted leave to assert a third-party claim against Mississippi. The third-party claim raised

the same federal questions as did the claim in intervention, and a third-party claim is always within the ancillary jurisdiction of the court.

That the Fifth Circuit found that the land in question is in Louisiana does not affect the jurisdiction of the district court in Mississippi to hear the case. It is not the law that the jurisdiction of a district court turns on what result it reaches on the merits of a dispute that is before it. *Durfee v. Duke*, 375 U.S. 106 (1963), established a "rule of jurisdictional finality" and explicitly refused to recognize an exception to that rule for cases involving real property over which the state claims exclusive jurisdiction. Under *Durfee*, once the location of land has been fully litigated and judicially determined, it cannot be retried in another state in litigation between the same parties.

The Mississippi district court had jurisdiction. Its fact-findings are fully supported by record evidence, and those findings control the decision here.

## ARGUMENT

### I. THE COURT BELOW MISAPPLIED THE RULE OF THE THALWEG AND THE DOCTRINE OF ACQUIESCENCE

The Rule of the Thalweg holds that the thalweg, or center of the main downstream navigation channel, locates the boundary between states bordering navigable waters. The boundary is established on the date the state



is admitted to the Union.[6] It may shift with gradual changes in the location of the channel but does not shift with avulsive, sudden, or violent changes. *Iowa v. Illinois*, 147 U.S. 1 (1893); *Louisiana v. Mississippi*, 466 U.S. 96, 100-101 (1984); *Missouri v. Kentucky*, 78 U.S. (11 Wall.) 395, 401 (1871); *Oklahoma v. Texas*, 260 U.S. 606 (1923); *Kansas v. Missouri*, 322 U.S. 219 (1944); *Louisiana v. Mississippi*, 466 U.S. 96.

The Island Rule, applicable here, represents an exception to the Rule of the Thalweg. Under the Island Rule, an island, once within the confines of a state's boundaries, remains a part of the state's territory irrespective of subsequent gradual changes in the location of the thalweg. In *Missouri v. Kentucky*, this Court stated:

> The boundaries of Missouri, when she was admitted into the Union as a State in 1820, were fixed on this basis [the location of the thalweg], as were those of Arkansas in 1836, 3 Stat. at L., 545; 5 Stat. at L. p. 50. And Kentucky succeeded in 1792 (1 Stat. at L., 189) to the ancient right and possession of Virginia, which extended, by virtue of these treaties, to the middle of the bed of the Mississippi River. It follows, therefore, that if Wolf Island, in 1763, or in 1820, or at any intermediate period between these dates, was east of this line, the jurisdiction of Kentucky rightfully attached to it. If the river has subsequently turned its course, and now runs east of the island, the status of the parties to this controversy is not altered by it, for the channel which the river abandoned remains, as before, the boundary between the States, and the island

[6] Louisiana was admitted in 1812. Mississippi was admitted in 1817.

does not, in consequence of this action of the water, change its owner.

78 U.S. at 401.[7]

### A. The Fifth Circuit's Error in Applying The Thalweg Rule

The uncontradicted evidence submitted at trial by Mississippi established that Stack Island was known to exist as early as the 1826-27 era. It is clearly shown on Plaintiff's Exhibit 1, a United States survey map of Township 11 North, Range 9 West, Issaquena County, Mississippi. (Pl.Ex. 1; Tr. 286, 286; J.A. 127) The survey map identifies the island and depicts its location east of the boundary channel (separated from the Mississippi mainland by a narrow chute) and within the jurisdiction of the State of Mississippi. No island is shown in the river on the Louisiana side of the boundary channel on the corresponding United States survey map of Township XXI, Range XIII East, now a part of East Carroll Parish, Louisiana. (Pl.Ex. 2; Tr. 287, 287; J.A. 128) Subsequent evidence of the location of Stack Island with respect to the channel exists in an 1867 map of the eastern shore of the Mississippi River (Pl.Ex. 3; Tr. 293, 293; J.A. 129), a map entitled, "Reconnaissance of the Mississippi River in 1874, made pursuant to an 1874 Act of the United States Congress" (Pl.Ex. 4; Tr. 295, 295; J.A. 130), and an 1879 map made as a blueprint of the plan for the Mississippi River Commission to narrow the channel of the river. (Pl.Ex. 5; Tr. 299,

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[7] The Fifth Circuit recognized the Island Rule. 937 F.2d at 250. (Pet. for Cert. App. 6a)



299; J.A. 131) These documents identify Stack Island, or Island No. 94, as land in place lying east of the main navigation channel and separated from the Mississippi mainland by a narrow chute channel. Mississippi's expert witness Smith carefully evaluated these and other materials and concluded that Stack Island had been an identifiable land mass in the Mississippi River located on the east side of the main navigation channel, or thalweg, and thus within the State of Mississippi since the 1826-1827 era. (J.A. 88-100)

Louisiana offered no evidence for the purpose of contradicting either the facts reflected in the early maps and surveys or the conclusion drawn by Mississippi's expert witness from those maps and surveys with respect to the location of the thalweg and Stack Island prior to the effective date of the United States patent in 1881.

It is apparent from a review of the trial court's bench opinion, its findings and conclusions, and the Fifth Circuit's opinion that the focus of both courts was on the location of the thalweg in relation to Stack Island at the time of the 1881 survey.[8]

The trial court analyzed the evidence and the conflicting testimony of the expert witnesses for Louisiana and Mississippi drawn from reports generated from and after the 1881 survey. Mississippi contended, in essence, that the boundary thalweg at the time of the reports, 1882

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[8] While at one point in his bench opinion the trial court refers to the thalweg as "always" having been located west of Stack Island (Pet. for Cert. App. 40a), this finding clearly appears to have been made in the context of the court's attention to the 1881 survey date.

and 1883, was west of Stack Island. Louisiana's contrary interpretation was likewise considered and discussed in the trial court's bench opinion. The trial court found that the weight of the evidence favored Mississippi's position. (Pet. for Cert. App. 24a-31a) The court noted that certain of the evidence indicated that the river was "trying to switch its course into the east chute," during the period under review, but found that, as of the date of the 1881 survey, the boundary thalweg lay west of Stack Island and that Stack Island was Mississippi land. (Pet. for Cert. App. 30a) The factual conclusions urged by Louisiana's experts were rejected. (Pet. for Cert. App. 32a, 33a) Stating that it "accepts the logic of [Mississippi's expert] Mr. Smith," the trial court found the boundary thalweg between Mississippi and Louisiana to have been located west of Stack Island in 1881.

> The Court, accordingly, rules that as of the date of the survey [August, 1881] the thalweg and therefore the boundary between Mississippi and Louisiana lay to the west of Stack Island.

(Pet. for Cert. App. 28a, 30a)

The trial court also examined evidence regarding the subsequent change in the main channel as a result of avulsive action, concluding correctly that avulsive changes in the boundary thalweg did not change state boundaries. (Pet. for Cert. App. 31a) It specifically found that Island No. 94, Stack Island, is the same land mass depicted on the 1881 survey.

> The Court does not accept the theory of the Louisiana parties. It is clear from the Louisiana exhibits themselves, La.-21, 27, and 29, that there has always been a land mass from 1881 to the present time which by map can be traced from the original Stack Island.



(Pet. for Cert. App. 32a) The court followed with the finding that

> [the] land mass which now lies against the Louisiana bank and which is the portion claimed by the Plaintiffs is Stack Island in the sense that it is the original island as it originally existed in 1881 plus accretion less erosion.

(Pet. for Cert. App. 33a)

Finally, the trial court found that the flow on the west of Stack Island ceased in 1954 and the boundary became fixed at that time. (Pet. for Cert. App. 34a, 48a-49a, 76a, 77a) See also *Arkansas v. Tennessee*, 246 U.S. 158, 175-77 (1918).

In order to determine whether Stack Island was within the territorial limits of Mississippi or Louisiana, it appears, under the decisions of this Court, to be necessary to determine where the island was located when Louisiana was admitted to the Union or at the time the island was formed. *See Missouri v. Kentucky*, 78 U.S. (11 Wall.) 395 (1871); *Mississippi v. Arkansas*, 415 U.S. 289 (1974); *Kansas v. Missouri*, 322 U.S. 213, 229 (1944); *Oklahoma v. Texas*, 260 U.S. 606 (1923); *Indiana v. Kentucky*, 136 U.S. 479, 508 (1890). However, no express findings were made with regard to the location of the boundary thalweg at that time. While the Fifth Circuit rejected the trial court's findings of fact, it likewise addressed only evidence with respect to the location of the thalweg from and after 1881. The obvious problem is that at this date it is impossible, except perhaps in legal contemplation, to fix the location of the thalweg or the existence of the

island in 1812. The earliest available documents locating the thalweg in relation to Stack Island were generated 16 to 17 years later. It is not clear under the circumstances, considering the specific and detailed nature of the trial court's findings in its bench opinion, whether an implied finding of fact can be indulged with respect to the existence and location of Stack Island prior to 1881 or whether a presumption of location can be made from the undisputed early documentary evidence. It is reasonable to do so. In any event, the trial court elected not to follow this course.

What is clear, however, is that the Fifth Circuit could not itself supply such a finding and that its independent analysis of the record and resulting determination of the thalweg's location in 1881 exceeded its authority under Rule 52(a). The Fifth Circuit's rendition of judgment in favor of Louisiana, having been based upon a finding that it was not authorized to make of a location at an irrelevant date, must be reversed.

Louisiana, as the third-party complainant, had the burden of proof. *Cf. Kansas v. Missouri*, 322 U.S. 213 (1944):

> Both by virtue of her position as complainant and on the facts, Kansas has the burden of proof in this case.

322 U.S. at 228. Louisiana offered no evidence of the location of Stack Island at the time Louisiana was admitted to the Union. Further, Mississippi's uncontradicted documentary evidence, generated from 1826 forward, showing Stack Island as lying east of the boundary thalweg raises at least a prima facie case of the existence and



location of the island in 1812. Louisiana did not undertake to controvert or otherwise dispute this evidence and thus failed to sustain its burden of rebutting Mississippi's prima facie case. *Cf. Mississippi v. Arkansas*, 415 U.S. 289, 294 (1974) (Arkansas failed to sustain its burden of rebutting Mississippi's prima facie case).

If a specific finding of the location of the thalweg at the time of Louisiana's admission to the Union or whenever Stack Island was formed is required, a remand to the district court would be appropriate to close the gap. *See Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 422 (1943). In view of the trial court's specific and conclusive findings regarding prescription and acquiescence and the extensive record support for such findings, as well as Louisiana's failure to meet its burden of proof, no such remand is required, however.

### B. The Fifth Circuit's Error in Disregarding the Trial Court's Findings of Acquiescence.

The Doctrine of Acquiescence fixes state boundaries as a result of acts of state dominion, control, and sovereignty over land, coupled with the failure of the adjoining state to assert claims of right or jurisdiction. *Arkansas v. Tennessee*, 310 U.S. 563 (1940); *Vermont v. New Hampshire*, 289 U.S. 593, 616 (1933); *Louisiana v. Mississippi*, 202 U.S. 1 (1906); *Virginia v. Tennessee*, 148 U.S. 503, 510 (1893); *Indiana v. Kentucky*, 136 U.S. 479 (1890). When applicable, it supersedes the Rule of the Thalweg.

In *Arkansas v. Tennessee*, 310 U.S. 563 (1940), this Court, quoting from the earlier case of *Rhode Island v.*

*Massachusetts*, 45 U.S. (4 How.) 591, 639 (1846), explained the doctrine in the following way:

> "For the security of rights, whether of states or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be involved with greater justice and propriety than in a case of disputed boundary." Applying this principle in *Indiana v. Kentucky*, 136 U.S. 479, 510, to the long acquiescence in the exercise by Kentucky of dominion and jurisdiction over the land there in controversy, the Court said: "It is a principle of public law universally recognized, that long acquiescence in the possession of territory and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority." Again, in *Louisiana v. Mississippi*, 202 U.S. 1, 53, the Court observed: "The question is one of boundary, and this Court has many times held that, as between the States of the Union, long acquiescence in the assertion of a particular boundary and the exercise of dominion and sovereignty over the territory within it, should be accepted as conclusive whatever the international rule might be in respect to the acquisition by prescription of large tracts of country claimed by both."

310 U.S. at 569.

Rejecting the contention that the Rule of the Thalweg preempts the Doctrine of Acquiescence, this Court stated:

> On behalf of Arkansas it is argued that the rule of the *thalweg* is of such dominating character that it meets and overthrows the defense of prescription and acquiescence. That position is untenable. The rule of the *thalweg* rests upon equitable considerations and is intended to safeguard to each State equality of access and right



> of navigation in the stream. *Iowa v. Illinois*, 147 U.S. 1, 7, 8; *Minnesota v. Wisconsin*, 252 U.S. 273, 281, 282; *Wisconsin v. Michigan*, 295 U.S. 455, 461; *New Jersey v. Delaware*, 291 U.S. 361, 380. The rule yields to the doctrine that a boundary is unaltered by an avulsion and in such case, in the absence of prescription, the boundary no longer follows the *thalweg* but remains at the original line although now on dry land because the old channel has filled up. *Nebraska v. Iowa*, 143 U.S. 359, 367; *Missouri v. Nebraska*, 196 U.S. 23, 36; *Arkansas v. Tennessee, supra*, pp. 173, 174. And, in turn, the doctrine as to the effect of an avulsion may become inapplicable when it is established that there has been acquiescence in a long-continued and uninterrupted assertion of dominion and jurisdiction over a given area. Here that fact has been established and the original rule of the *thalweg* no longer applies.

310 U.S. at 571.

The trial court, having first found that Stack Island was located in Mississippi under the Rule of the Thalweg, made express findings with respect to the Doctrine of Acquiescence to secure its ultimate ruling. (Pet. for Cert. App. 37a) The court found on the ultimate issue that Mississippi had established sovereignty by the Doctrine of Acquiescence and made subsidiary findings, *inter alia*: (1) that since 1889, the year following the issuance of the Blackwell patent, taxes had been paid on the island to Issaquena County, Mississippi; (2) that Issaquena County officials had claimed jurisdiction over the island for criminal purposes; (3) that Louisiana officials did not attempt to exercise jurisdiction over the island but, rather, referred enforcement matters to Mississippi officials (Pet. for Cert. App. 38a); and (4) that Mississippi's exercise of

dominion and jurisdiction spanned a period of approximately 108 years:

> In fact the period of exclusive jurisdiction by the State of Mississippi has run from 1881 to the present time.

(Pet. for Cert. App. 40a)

Louisiana's claim of jurisdiction over the lands in question prior to its intervention related primarily to legislation enacted by it in 1908 and alleged acts of the Fifth Louisiana Levee District during the period from 1907 through approximately 1911. The trial court examined this evidence in detail and found that neither the statute nor related maps and documentary material offered by Louisiana referred to Stack Island and that Louisiana had not asserted jurisdiction during this period. (Pet. for Cert. App. 40a)

The trial court concluded its discussion of the evidence and summarized its findings as follows:

> The Court, accordingly, concludes from a preponderance of the evidence that even if it is wrong in concluding that the boundary thalweg lay always to the west of Stack Island and, accordingly, that Stack Island was in fact in Louisiana at some time, that Louisiana has acquiesced in the exercise of the exclusive jurisdiction over the island by the State of Mississippi and that it is now in the State of Mississippi.

(Pet. for Cert. App. 40a)

On appeal, the Fifth Circuit concluded that the trial court had erroneously applied the law to its fact-findings and reviewed the issue *de novo*. Selectively discussing portions of the evidence, the Fifth Circuit held that the



Doctrine of Acquiescence was inapplicable. This was error. The record overwhelmingly supports the trial court's finding of acquiescence, both as a matter of fact and law.

This Court has identified a number of facts relevant to the determination of prescription and acquiescence.

It has treated patents issued by the United States showing property to be in a particular state as probative of acquiescence. *Louisiana v. Mississippi*, 202 U.S. 1, 55-56 (1906). Stack Island was patented as land located in Issaquena County, Mississippi. (Pl.Ex. 41; Tr. 200, 218) It may reasonably be implied from these facts that the patentee regarded the land as being located in Mississippi and so treated it in his application. Nothing in the record indicates that Louisiana has taken any action to contest this patent or itself to issue any patent, deed, lease, permit, or other authorization suggesting that it sought to exercise dominion over the island at any time. See Pet. for Cert. App. at 40a.

The assessment and payment of taxes over a long period of time have been held relevant to the determination. *Arkansas v. Tennessee*, 310 U.S. at 567-68; *Vermont v. New Hampshire*, 289 U.S. 593, 616 (1933); *Louisiana v. Mississippi*, 202 U.S. at 55; *Virginia v. Tennessee*, 148 U.S. 503, 510 (1893). The record evidence established conclusively that, at least as early as 1889, the year following the Blackwell patent, and continuously thereafter, taxes have been assessed by and paid to Issaquena County, Mississippi. (Pl.Ex. 64; Tr. 211-13, 218; J.A. 75) It is further shown that Mississippi enforced its tax assessment in 1929 through foreclosure and by thereafter deeding the

island to the predecessor of the Houston group. (Pl.Ex. 46; Tr. 201, 218) In contrast, there is no evidence in the record of any taxes being assessed with respect to Stack Island by Louisiana or any of its political subdivisions. The Fifth Circuit's comment that there is some evidence that both states claimed the disputed lands as a tax base (Pet. for Cert. App. 14a) is apparently based on the argument of Louisiana.

Court actions concerning the land in which the state has exercised jurisdiction have likewise been viewed as acts of sovereignty. *Indiana v. Kentucky*, 136 U.S. at 518-19. Here, both Mississippi state and federal courts have exercised jurisdiction over controversies involving the island. (Pet. for Cert. App. 21a, 52a) *See, e.g., Houston v. United States Gypsum Co.*, 569 F.2d 880 (5th Cir.), *reh'g denied with opinion*, 580 F.2d 815 (1978), *appeal after remand*, 652 F.2d 467 (1981).[9] There is no evidence of any Louisiana court

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[9] It is not contended that Louisiana is bound by the Fifth Circuit's decision in *Houston v. United States Gypsum Co.*, 569 F.2d 880 (5th Cir. 1978). The decision, however, is evidence of the general recognition of the island as Mississippi land, as well as an example of the exercise of jurisdiction by Mississippi courts. The payment of taxes to Mississippi authorities over a long period of time is specifically mentioned. 569 F.2d at 885. The opinion in that case provides a touch of irony worth noting: "We begin with 'Stack Island' in the Mississippi River, *so identified in the original 1826 United States Land Survey* (platted as 'Island No. 94' by the government in 1881)." 569 F.2d at 881 (emphasis added). Specifically addressing the issue here, the Fifth Circuit observed, "An avulsion does not change the boundary. Hence, *all the territory involved in this controversy is in*

(Continued on following page)



having at any time undertaken to exercise any jurisdiction over the island.

Township surveys prepared by the United States General Land Office have been given emphasis. *Indiana v. Kentucky*, 136 U.S. 479, 512-14 (1890); *Louisiana v. Mississippi*, 202 U.S. 1, 53 (1908). Such surveys in the record here show Stack Island as Mississippi land. (Pl.Ex. 1; Tr. 286, 286; J.A. 127) No township surveys indicate that Stack Island was at any time regarded as part of Louisiana. The 1828 and 1829 United States survey map showing what is now East Carroll Parish, Louisiana, does not show Stack Island, while that portion of the survey directly across the river shows Stack Island as Mississippi land. (Pl.Ex. 2; Tr. 287, 287; J.A. 128)

Grants by the state to individuals have likewise been treated as acts of sovereignty. *Indiana v. Kentucky*, 136 U.S. at 516-18; *Louisiana v. Mississippi*, 202 U.S. at 52-53. Mississippi deeded Stack Island to the predecessor of the Houston group in 1933 following its tax foreclosure. (Pl.Ex. 46; Tr. 201, 218) The record contains no conveyance of any other right or interest by Louisiana or any of its political subdivisions.

Additionally, acts and recognitions of state officials and individuals that tend to show in which state the land is located have been regarded as indicative of the exercise of sovereignty. *Kansas v. Missouri*, 322 U.S. at 402-05;

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*Issaquena County, Mississippi*, even though Stack Island is now west of the main channel of the Mississippi River." 569 F.2d 881, n.2 (emphasis added).

*Louisiana v. Mississippi*, 202 U.S. at 56; *Arkansas v. Tennessee*, 310 U.S. at 565-68; *Oklahoma v. Texas*, 260 U.S. 606 (1923). The trial court identified these acts at length. (Pet. for Cert. App. 37a, 38a) It found, *inter alia*, that Issaquena County, Mississippi, officials have asserted criminal jurisdiction, that persons charged with game violations have been delivered by Louisiana officials to Mississippi officials for prosecution (Pet. for Cert. App. 38a; see also J.A. 78-87), that Louisiana State Police, in carrying out reconnaissance operations for marijuana patches on Stack Island, did not attempt to exercise jurisdiction but, rather, notified the Mississippi Bureau of Narcotics of such findings and left it to Mississippi to issue appropriate search warrants and take enforcement action (J.A. 84), that Louisiana authorities, having arrested suspects on the island, turned such suspects over to Mississippi Bureau of Narcotics agents and that such parties were prosecuted in Mississippi by Mississippi officials (Pl.Ex. 65; Tr. 213-15, 218; Pet. for Cert. App. 38a), and generally that Louisiana officials declined to exercise jurisdiction on the island. (J.A. 78, 82-84, 86)

Private citizens familiar with Stack Island for many years testified to the effect that it had always been treated as Mississippi land and assumed to be Mississippi land. (J.A. 78, 81, 82, 85)[10]

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[10] The Fifth Circuit gently denigrates this evidence as the testimony of a "colorful assortment of Mississippi citizens." 937 F.2d at 253. (Pet. for Cert. App. 13a) It is, however, precisely the type of testimony considered in *Kansas v. Missouri*, 322 U.S. at 220-27. *See also Arkansas v. Tennessee*, 310 U.S. at 567; *Oklahoma v. Texas*, 260 U.S. 606, 635-36 (1923).



Rather than looking at the record as a whole, the Fifth Circuit simply identified what it referred to as a few "isolated incidents" of recognition of Mississippi jurisdiction and concluded that such incidents were insufficient to constitute "long, continuing and uninterrupted assertion of dominion and jurisdiction over an area." 937 F.2d at 253 (Pet. for Cert. App. 14a) (citing *Arkansas v. Tennessee*, 310 U.S. at 571). The Fifth Circuit did not recognize or otherwise address the other relevant facts of acquiescence identified by the authorities cited above and established by the record.

While the Fifth Circuit might have reached, and in fact did reach, a different conclusion in its interpretation of the record evidence, it was not entitled to substitute its findings for those of the trial court nor did it purport to do so. Rather, it stated that it accepted the trial court's findings with respect to acquiescence, concluding only, but erroneously, that the trial court misapplied the law to the facts.

The Fifth Circuit's treatment of the facts is not consistent with the record, and its treatment of the law and relevant inquiries relating to the Doctrine of Acquiescence are contrary to the decisions of this Court. Viewed in its entirety, the record establishes both through oral testimony and documentary evidence that Stack Island has been regarded as Mississippi land since 1826-1827, that Mississippi has exercised jurisdiction and sovereignty over it, and that at no time since its existence was first shown by evidence generated more than a century and a half ago has Louisiana undertaken to challenge or

break that exercise of sovereignty. In light of this evidence and the factual nature of the determination of prescription and acquiescence, the Fifth Circuit erred in reviewing the trial court's findings *de novo* and in determining the acquiescence issue in favor of Louisiana.

## II. THE COURT BELOW EXCEEDED THE PROPER SCOPE OF REVIEW UNDER RULE 52(a)

The location of the boundary thalweg in relation to Stack Island and the determination whether the Doctrine of Acquiescence is applicable are matters that implicate purely factual determinations. *See Kansas v. Missouri*, 322 U.S. at 220-27; *Arkansas v. Tennessee*, 310 U.S. at 567 (the exercise of jurisdiction and dominion and acquiescence characterized as "that question of fact").

In its bench opinion of June 23, 1989, the trial court reviewed and analyzed the record evidence and, as required by Rule 52, made extensive findings of fact with respect to both issues. The Fifth Circuit treated the trial court's findings with respect to the location of the thalweg as "clearly erroneous." It finessed the findings with respect to the prescription and acquiescence issue, holding that the trial court had misapplied the law to the fact-findings and thus it was entitled to review *de novo*. 937 F.2d at 253-54. (Pet. for Cert. App. 14a)

Under the caption "Wading In: Two Tales of One River," the Fifth Circuit began its analysis thusly: "We begin our voyage down the river with a review of the factual bases for each party's ownership claim. Their tales are so divergent that each will be separately recounted." 937 F.2d at 249. (Pet. for Cert. App. 3a) The court then, as



it suggests it will, selects the "tale" it regards as the more plausible. In doing so, it wades in more deeply than Rule 52(a) allows.

Rule 52(a) provides that findings of fact "shall not be set aside unless clearly erroneous." The Fifth Circuit purported to resolve this factual dispute "against the backdrop of the clearly erroneous standard," 937 F.2d at 251 (Pet. for Cert. App. 7a), but it misunderstood that standard. Two paragraphs after the statement about "backdrop" the Fifth Circuit said:

> Although we acknowledge that the district court's findings are entitled to deference, after our review of the evidence, we are "left with the clear impression that an error has been made." *Stauffer Chemical Co. v. Brunson*, 380 F.2d 174, 181 (5th Cir. 1967).

937 F.2d at 251. (Pet. for Cert. App. 8a)

A decision that relies on a 1967 precedent to measure the reach of Rule 52(a) in 1991 is inherently suspect. Much has happened in the last quarter-century to clarify the scope of appellate review in nonjury cases. Rule 52 itself was amended in 1985, and there have been important decisions from this Court. In particular, it is now clear that the appellate court's belief that it would have weighed the evidence differently is not enough for reversal.

The key case is *Anderson v. City of Bessemer City*, 470 U.S. 564 (1985), where Justice White, writing for the Court, gave new precision to the "clearly erroneous" standard.

> This standard plainly does not entitle a reviewing court to reverse the finding of the trier of

fact simply because it is convinced that it would have decided the case differently. The reviewing court oversteps the bounds of its duty under Rule 52(a) if it undertakes to duplicate the role of the lower court. "In applying the clearly erroneous standard to the findings of a district court sitting without a jury, appellate courts must constantly have in mind that their function is not to decide factual issues *de novo*." *Zenith Radio Corp v. Hazeltine Research, Inc.*, 395 U.S. 100, 123 (1969). If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently. Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous. *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949); see also *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982).

470 U.S. at 573-74.

The Court explained the policy and rationale for mandating deference to the trial court as the finder of fact in the following way:

> The rationale for deference to the original finder of fact is not limited to the superiority of the trial judge's position to make determinations of credibility. The trial judge's major role is the determination of fact, and with experience in fulfilling that role comes expertise. Duplication of the trial judge's efforts in the court of appeals would very likely contribute only negligibly to the accuracy of fact determination at a huge cost in diversion of judicial resources.

470 U.S. at 574-75.



The Court stated further that the fact finder's choice controls "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." 470 U.S. at 574.

This was no new learning. The *Anderson* case reinforces, and spells out even more forcefully, what had been announced three years earlier in *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982):

> By rejecting the District Court's findings simply because it would have given more weight to evidence of mislabeling than did the trial court, the Court of Appeals clearly erred. Determining the weight and credibility of the evidence is the special province of the trier of fact. Because the trial court's findings concerning the significance of the instances of mislabeling were not clearly erroneous, they should not have been disturbed.

456 U.S. at 856. And again:

> An appellate court cannot substitute its interpretation of the evidence for that of the trial court simply because the reviewing court "might give the facts another construction, resolve the ambiguities differently, and find a more sinister cast to actions which the District Court apparently deemed innocent." *United States v. Real Estate Boards*, 339 U.S. 485, 495 (1950).

456 U.S. at 857-58.

The Fifth Circuit's opinion here suggests that the court regarded its authority on review as limited only in the sense that it give "due regard to the witness' credibility." 937 F.2d at 251. (Pet. for Cert. App. 7a) This

interpretation is given credence by the court's independent, extensive, and probing assessment of the documentary evidence. See 937 F.2d at 251-53. (Pet. for Cert. App. 8a-12a) While there might have been some question of different standards of deference for documentary evidence and oral testimony prior to *Inwood*, *Anderson*, and the 1985 amendment, there can now be no question.[11]

This Court in *Amadeo v. Zant*, 486 U.S. 214 (1988), reversed a decision in which, like the Fifth Circuit's decision here, the court of appeals "offered factual rather than legal grounds for its reversal of the district court's order." Quoting and restating the rule of *Anderson v. City of Bessemer City*, this Court emphasized the proper application of the clearly-erroneous standard as follows:

> We have stressed that the clearly-erroneous standard of review is a deferential one, explaining that "[i]f the district court's account of the

[11] As amended, effective December 1, 1985, Rule 52(a) expressly provides that findings of fact, "whether based on oral or documentary evidence," shall not be set aside unless clearly erroneous. The notes of the Advisory Committee on Rules make clear that the purpose of the 1985 amendment was to avoid continued confusion and conflicts among the circuits as to the standard of appellate review of findings of fact by the courts, to eliminate the disparity between the standard of review as stated in the rules and the practice of some courts of appeal, and to promote nationwide uniformity. Specific reference is made to the distinction some appellate courts had applied to findings based on documentary evidence as distinguished from those involving credibility determinations, as well as to the decision of this Court in *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), recognizing that the issue had not been resolved by this Court.



> evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact, it would have weighed the evidence differently." *Anderson v. Bessemer City, supra.*

486 U.S. at 223.

In *Amadeo*, there was significant evidence supporting the findings of fact favored by the court of appeals. The Court nevertheless reversed on the ground that the reviewing court could not select between alternative permissible views but was, rather, required to accept the findings made by the trial court.

> Although there is significant evidence in the record to support the findings of fact favored by the Court of Appeals, there is also significant evidence in the record to support the District Court's contrary conclusion, as we describe in more detail below. We frequently have emphasized that "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City*, 470 U.S., at 574, citing *United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949), and *Inwood Laboratories, Inc. v. Ives Laboratories, Inc.*, 456 U.S. 844 (1982). We reaffirm that stricture today.

486 U.S. at 225-26.

In applying the "clearly erroneous" standard, no distinction is to be made between "ultimate" findings of fact by the trial court and "subsidiary" findings.

> Rule 52(a) broadly requires that findings of fact not be set aside unless clearly erroneous. It does not make exceptions or purport to exclude certain categories of factual findings from the obligation of a court of appeals to accept a district court's findings unless clearly erroneous. It does not divide facts into categories; in particular, it does not divide findings of fact into those that deal with "ultimate" and those that deal with "subsidiary" facts.

*Pullman-Standard v. Swint*, 456 U.S. 273, 287 (1982).

If the trial court has failed to make findings essential to a proper resolution of the issue, the reviewing court can only remand for further findings. Fact-finding responsibility remains exclusively within the province of the trial court. *Icicle Seafoods, Inc. v. Worthington*, 475 U.S. 709 (1986). In reversing the court of appeals in that case because it had usurped the fact-finding role, this Court further amplified the scope of review under Rule 52(a):

> If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings. If it was of the view that the findings of the District Court were "clearly erroneous" within the meaning of Rule 52(a), it could have set them aside on that basis. If it believed that the District Court's factual findings were unassailable, but that the proper rule of law was misapplied to those findings, it could have reversed the District Court's judgment. But it should not simply have made factual findings on its own.

475 U.S. at 714.



Although the Fifth Circuit gave nominal recognition to the constraints imposed upon it by Rule 52(a), it effectively disregarded those constraints and substituted its own findings of fact for those of the trial court. Further, it concluded that, in determining the location of the thalweg, Mississippi's expert, Smith, had misinterpreted the documentary evidence and drawn erroneous conclusions from it.[12] It accepted the interpretation of the Louisiana experts that had been expressly rejected by the trial court and adopted their interpretation as its own.[13] If, as

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[12] The Fifth Circuit drew support for its rejection of Mr. Smith's interpretation with respect to the location of the thalweg in the vicinity of Stack Island in 1881 from this Court's rejection of the same witness's testimony in *Louisiana v. Mississippi*, 466 U.S. 96, 103-06 (1984). *See* 937 F.2d at 252. (Pet. for Cert. App. 11a) This Court, however, was exercising its original jurisdiction and made its own independent review of the record. In doing so, it noted simply that "qualified experts differed in their conclusions." 466 U.S. at 106. This is quite different from a review under the "clearly erroneous" standard of Rule 52(a).

[13] Like the decision reviewed in *Amadeo*, 486 U.S. 214, the Fifth Circuit's opinion offers factual rather than legal grounds for reversing the trial court. The opinion states that it was "illogical" for vessels to employ a route that was longer and marked by treacherous "shoals." On this basis, the Fifth Circuit held that the thalweg was incorrectly found by the trial court. 937 F.2d at 251-52. (Pet. for Cert. App. 9a) It brushed aside evidence on which the trial court had relied. A surveyor's notation that there was a "good deep channel" (Pl.Ex. 7; Tr. 307, 307; J.A. 132) to the west of Stack Island was dismissed as a "vague notation" and "less than determinative." *Id.* The placement of United States navigation lights on the banks of the river as reflected on a shoreline survey (Pl.Ex. 8, Tr. 313, 313; J.A. 133) was thought to be "inconclusive." 937

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repeatedly stated by the Fifth Circuit, the evidence is truly "inconclusive," there must be more than one permissible view of it and the district court's findings cannot be set aside as clearly erroneous. In a comment bearing directly on the conflict in expert testimony before the trial court, this Court said:

> [W]hen a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error.

*Anderson*, 470 U.S. at 575.

With respect to the Doctrine of Acquiescence, the Fifth Circuit simply dismissed the findings of the trial court, stating that the trial court "had improperly applied the law to its factual findings." 937 F.2d at 253. (Pet. for Cert. App. 12a) The Fifth Circuit conducted its review *de novo* and concluded that the trial court ruling could not be sustained.

Like the location of the boundary thalweg, acquiescence *vel non* is a pure fact question. As discussed previously, a substantial body of evidence exists in the record

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F.2d at 252. (Pet. for Cert. App. 10a) A reference in the shoreline survey to "shoals" at the foot of the east channel was thought to be "refuted" by hydrographic data obtained three months later and shown on another survey map, and these "factual disputes" were thought to demonstrate the "inconclusiveness" of the shoreline survey. 937 F.2d at 252, n.4. (Pet. for Cert. App. 9a)



supporting the trial court's ultimate finding of acquiescence, as well as the subsidiary findings contained in its bench opinion. The Fifth Circuit exceeded the limits of its authority in failing to accord such findings controlling effect.

In addition to its comprehensive subsidiary findings, the trial court made two conclusive, ultimate findings of fact that control this case. Neither is vulnerable under the "clearly erroneous" standard. With respect to the boundary issue, the trial court found as follows:

> The Court, accordingly, concludes that the Plaintiffs' claims to the land mass insofar as claiming that it is one land mass and that it lies in the State of Mississippi are proven by a preponderance of the evidence, and the Court so finds.

(Pet. for Cert. App. 36a) Regarding acquiescence, the court found:

> If the land be not in the State of Mississippi because of the thalweg boundary, that land is in the State of Mississippi under the Doctrine of Acquiescence.

(Pet. for Cert. App. 41a) The record read as a whole contains more than ample evidence to support these findings. They represent, at the very least, "permissible views" of the evidence and cannot, therefore, be deemed "clearly erroneous." They control the determination whether Stack Island lies within Mississippi or Louisiana. The Fifth Circuit was neither authorized to set these findings aside nor to render judgment for Louisiana on the basis of its own findings.

## III. THE DISTRICT COURT PROPERLY ASSERTED JURISDICTION OVER LOUISIANA'S THIRD-PARTY COMPLAINT AGAINST MISSISSIPPI

In its order of March 23rd granting certiorari, the Court formulated the following question as part of the grant: "Did the district court properly assert jurisdiction over respondent's third-party complaint against petitioner State of Mississippi." In the view of petitioners, the answer to that question is "Yes."[14]

The question the Court has posed raises several different issues. (1) Does the grant to this Court, in 28 U.S.C. § 1251(a), of "original and exclusive jurisdiction of all controversies between two or more States" preclude all other courts from taking jurisdiction of a controversy between two states? (2) Was Louisiana's third-party claim against Mississippi within the jurisdiction of the district court? (3) If the land in question is, as the Fifth Circuit found, in Louisiana, does that mean that the district court lacked power to exercise jurisdiction over it?

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[14] This is the view of the Houston group of petitioners, although it is not clear whether they have any interest in this jurisdictional question. Mississippi undoubtedly has an interest. A holding that the district court lacked jurisdiction of the third-party complaint against Mississippi would require vacation of the judgment against the state and leave Mississippi free to litigate the boundary issue anew. But Mississippi took the view when the case was here before (at a time before the district court had ruled) that the United States District Court for the Southern District of Mississippi was an adequate forum for resolution of the issue, with normal appellate review. Brief in Opposition to Motion for Leave to File Complaint, *Louisiana v. Mississippi*, No. 114, Original, October Term 1988. Mississippi believes that what it said in 1988 was correct and it adheres to that position now.



Section 1251 of the Judicial Code draws a seemingly sharp distinction. Subsection (a) gives this Court "original and exclusive jurisdiction of all controversies between two or more States," while subsection (b) gives the Court "original but not exclusive jurisdiction" of three other classes of cases. But as the statute has been repeatedly applied, it means less than it says.

> We have generally observed that the Court's original jurisdiction should be exercised "sparingly," *Maryland v. Louisiana*, 451 U.S., at 739, 101 S.Ct., at 2125; *United States v. Nevada*, 412 U.S. 534, 538, 93 S.Ct. 2763, 2765, 37 L.Ed.2d 132 (1973), and this Court applies discretion when accepting original cases, even as to actions between States where our jurisdiction is exclusive. As stated not long ago:
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> "In recent years, we have consistently interpreted 28 U.S.C. § 1251(a) as providing us with substantial discretion to make case-by-case judgments as to the practical necessity of an original forum in this Court for particular disputes within our constitutional original jurisdiction. See *Maryland v. Louisiana*, 451 U.S. 725, 743, [101 S.Ct. 2114, 2127, 68 L.Ed.2d 576] (1981); *Ohio v. Wyandotte Chemicals Corp.*, 401 U.S. 493, 499 [91 S.Ct. 1005, 1010, 28 L.Ed.2d 256] (1971). We exercise that discretion with an eye to promoting the most effective functioning of this Court within the overall federal system." *Texas v. New Mexico*, 462 U.S. 554, 570, 103 S.Ct. 2558, 2568 77 L.Ed.2d 1 (1983).

Specifically, we have imposed prudential and equitable limitations upon the exercise of our original jurisdiction, and of these limitations we have said:

> "We construe 28 U.S.C. § 1251(a)(1), as we do Art. III, § 2, cl. 2, to honor our original jurisdiction but to make it obligatory only in appropriate cases. And the question of what is appropriate concerns, of course, the seriousness and dignity of the claim; yet beyond that it necessarily involves the availability of another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Illinois v. City of Milwaukee*, 406 U.S. 91, 93, 92 S.Ct. 1385, 1387, 31 L.Ed.2d 712 (1972); *California v. Texas*, 457 U.S. 164, 168, 102 S.Ct. 2335, 2337, 72 L.Ed.2d 755 (1982).

*Wyoming v. Oklahoma*, 112 S. Ct. 789, 798 (1992).

As Justice Thomas pointed out in his dissent from the opinion just quoted, the application of this discretion to cases made "exclusive" by § 1251(a) has been questioned both within and without the Court. *Wyoming v. Oklahoma*, 112 S. Ct. at 811 n.1 (Thomas, J., dissenting). Some commentators have been sharply critical. *E.g.*, BATOR, MELTZER, MISHKIN & SHAPIRO, HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 344 (3d ed. 1988) (Court's explanation of its present approach is "an oxymoron"); Shapiro, *Jurisdiction and Discretion*, 60 N.Y.U. L. Rev. 543, 561 (1985) (criticism of the Court's approach is "unanswerable"). Other commentators, however, have supported what the Court has done.

> Both the development and exercise of this superficially surprising power are justified for the reasons announced by the Court itself. . . . Absent any indication that Congress has ever addressed the question of discretion to deny jurisdiction, however, it again seems proper to deny jurisdiction if the issues offered for litigation are clearly subject to resolution in an alternative forum and ensuing review by the Supreme Court.



17 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 4053, at 260-61, 269 (1988). See also Note, *Exclusive Original Jurisdiction of the United State Supreme Court: Does It Still Exist?*, 1982 B.Y.U. L. Rev. 727, 751 (concluding that "[p]erhaps the Court is right in making this change").

Whatever the commentators may think, it is the law of this Court that it has discretion whether to allow its original jurisdiction to be invoked in suits between states within § 1251(a) and that it can refuse leave to file if there is an appropriate forum in which the issues can be litigated. In addition to the cases cited for this proposition in the Court's opinion in *Wyoming v. Oklahoma*, quoted above, see *Arizona v. New Mexico*, 425 U.S. 794 (1976), *California v. West Virginia*, 454 U.S. 1027 (1981), and, most conspicuously, this very controversy, in which the Court denied Louisiana's motion for leave to file a bill of complaint. *Louisiana v. Mississippi*, 488 U.S. 990 (1988) (Pet. for Cert. App. 91a).

All of the cases recognizing discretion in this Court to refuse to hear cases that are within its original jurisdiction have emphasized that this is proper only if the issues are clearly subject to resolution in an alternative forum. *Wyoming v. Oklahoma*, 112 S. Ct. 789, 799 (1992); and see *id.*, 112 S. Ct. at 811 (Thomas, J., dissenting). When the Court denied Louisiana's motion for leave to file in 1988, it must have supposed that there was a suitable forum in which this dispute could be resolved. That forum could only have been the then-pending action in the District

Court for the Southern District of Mississippi, which is now here on certiorari. That was the alternative forum referred to in Justice White's dissent from denial of leave to file, 488 U.S. at 991 (Pet. for Cert. App. 91a). It was the only alternative mentioned by the parties in their briefs. We do not suggest that the prior decision establishes as law of the case that the district court properly asserted jurisdiction of the dispute between the two states,[15] but the denial of leave to file, over the dissent of three Justices who argued that there was no suitable alternative forum, must surely have rested on a considered judgment by the majority that the district court was indeed "another forum where there is jurisdiction over the named parties, where the issues tendered may be litigated, and where appropriate relief may be had." *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972), quoted in *Wyoming v. Oklahoma*, 112 S. Ct. 789, 798 (1992).

That judgment was correct. The district court, which undoubtedly had jurisdiction on the basis of diversity of citizenship of the original suit between the private parties, had jurisdiction also of Louisiana's claim in intervention and of its third-party complaint against Mississippi.

This action was commenced when plaintiffs, all of whom are alleged to be resident citizens of Mississippi or Texas, filed their Complaint to Remove Cloud on July 29, 1986. The defendants were all Louisiana riparian owners, alleged to be domiciled in Louisiana or in states other than Mississippi and Texas. Jurisdiction was asserted

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[15] See *Wyoming v. Oklahoma*, 112 S. Ct. 788, 796 (1992); and see *id.*, 112 S. Ct. at 804-05 (Scalia, J., dissenting).



under 28 U.S.C. § 1332 on the basis of diversity of citizenship. Jurisdiction of the original action has never been questioned. On June 17, 1987, Louisiana and the Lake Providence Port Commission moved to intervene to assert claims of their own. (J.A. 5) This motion was granted June 30, 1987. (J.A. 9) The state and the Commission prayed that the district court determine the proper boundary line between Louisiana and Mississippi and that it adjudicate "the lands in question to the proper parties as owners thereof, as between plaintiffs, defendants and intervenors." (J.A. 14) On November 16, 1987, Louisiana moved for leave to file a third-party complaint against Mississippi. This motion was granted November 23, 1987. (J.A. 21) The third-party complaint again asked the court to determine the proper boundary line between the states and to adjudicate the lands in question. (J.A. 25) In its answer to the third-party complaint, Mississippi prayed the court to declare that the lands are in Mississippi and asked also that the court adjudicate the lands in question to the proper parties as owner. (J.A. 30)

Although this Court's question goes only to jurisdiction of the third-party complaint, it is necessary first to examine the district court's assertion of jurisdiction over Louisiana as an intervenor. Unless Louisiana properly brought itself within the jurisdiction of the district court, it could not assert a third-party claim. But there are two separate bases on which the district court correctly took jurisdiction of Louisiana's claim in intervention.

First, Louisiana was invoking federal-question jurisdiction. The state's motion to intervene (J.A. 5), its memorandum in support of its motion to intervene (J.A. 7), and paragraph 1 of its intervention (J.A. 11) all claim jurisdiction under the federal-question statute, 28 U.S.C.

§ 1331, and assert that the intervenors' rights arise under the Constitution of the United States, the Act of April 6, 1812, admitting Louisiana into the Union, and the Treaty of Peace concluded September 3, 1783, between the United States and Great Britain. This is a proper invocation of federal-question jurisdiction. To the extent that Louisiana's claim is viewed as a bill to remove a cloud on title, it has long been settled that it can come within federal-question jurisdiction. *Hopkins v. Walker*, 244 U.S. 486 (1917). Even if the interaction of the forms of action and the well-pleaded complaint rule were such that a particular dispute about ownership of land would be held not to raise a federal question – see AMERICAN LAW INSTITUTE, STUDY OF THE DIVISION OF JURISDICTION BETWEEN STATE AND FEDERAL COURTS 170 (1969) – that could not be the rule where the boundary between two states is at issue. There is a close analogy to Indian land title. This is continuously a matter of federal law, so that even a possessory action by an Indian tribe is within federal-question jurisdiction, *Oneida Indian Nation of New York State v. County of Oneida*, 414 U.S. 661 (1974). "[A]bsent federal statutory guidance, the governing rule of decision would be fashioned by the federal court in the mode of the common law." *Id.*, 414 U.S. at 674. A claim by an Indian tribe is quite unlike "garden-variety ejectment claims." *Id.*, 414 U.S. at 684 (Rehnquist, J., concurring). On like reasoning, a claim by a state about where its boundary is must always be a matter of federal law. Either state boundaries are determined by Acts of Congress and treaties to which the United States is a party or they must be resolved by application of federal common law. "[N]either the statutes nor the decisions of either State can be conclusive." *Hinderlider v. La Plata River & Cherry*



*Creek Ditch Co.*, 304 U.S. 92, 110 (1938); 17 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 4052 (1988).

Although we think it clear that Louisiana properly invoked federal-question jurisdiction as the basis for its intervention, the result would be the same even if Louisiana's claims were found not to raise a federal question. Louisiana alleged that it was entitled "to intervene in this action as a matter of right." (J.A. 5) This was correct. Rule 24(a)(2) of the Federal Rules of Civil Procedure allows intervention of right "when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties." Louisiana was claiming an interest in the property that was the subject of the action, and it is hard to imagine any situation in which it would be held that a sovereign state must be content to be represented by private parties. A judgment in the original action would not have been binding on Louisiana, *Durfee v. Duke*, 375 U.S. 106, 115-16 (1963), but the principal purpose of the rewriting of Rule 24 by the 1966 amendments was "to eliminate the old reading that a would-be intervenor must be legally bound, and . . . instead the court is to view the effect on his interest with a practical eye." WRIGHT, FEDERAL COURTS 503 (4th ed. 1983). Stare decisis by itself is now regarded as sufficient to supply the practical disadvantage that is required for intervention under Rule 24(a)(2). *E.g., Oneida Indian Nation of Wisconsin v. New York*, 732 F.2d 261 (2d Cir. 1984); *Atlantis*

*Development Corp. v. United States*, 379 F.2d 818 (5th Cir. 1967).

Although this Court never spoke broadly to the question, the general understanding has been that ancillary jurisdiction applied, and no independent basis of jurisdiction was required, where there was intervention of right. Whether or not this is or was universally true is unimportant.

> The cases in which intervention is of right because the absentee claims an interest relating to the property that is the subject of the action seem very easy. The oldest and most thoroughly established justification for ancillary jurisdiction is when property actually or constructively under the control of the court is the subject of litigation[16] and this has often been the basis in modern cases for allowing intervention though there are no independent grounds of jurisdiction.

7C WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1917, at 475-76 (1986). Intervention by Louisiana was of right and could have been based on ancillary jurisdiction if federal-question jurisdiction of the intervention had been lacking.[17]

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[16] Citing *Phelps v. Oaks*, 117 U.S. 236 (1886), and *Krippendorf v. Hyde*, 110 U.S. 276, 285 (1884).

[17] There is considerable uncertainty about how the new supplemental-jurisdiction statute, 28 U.S.C. § 1367, applies to intervention. "The vague phrasing of section 1367(b) could also, but need not, be construed to go beyond pre-existing law in limiting the availability of ancillary jurisdiction over non-diverse parties seeking to intervene as of right as plaintiffs to

(Continued on following page)



Once it is seen that the district court had jurisdiction over Louisiana as an intervenor, jurisdiction of the state's third-party complaint against Mississippi follows easily.[18] The same federal questions that are raised by Louisiana's intervention are raised by its third-party complaint. Indeed the case is strongest here for application of federal common law to the extent that the boundary is not defined by Acts of Congress or by treaties. "Litigation between two or more states presents the most obvious need for rules of decision controlled by the Supreme Court." 17 WRIGHT, MILLER & COOPER, FEDERAL PRACTICE AND PROCEDURE: JURISDICTION 2D § 4052, at 252 (1988). And ancillary jurisdiction surely applies to a third-party claim against a defendant impleaded under Rule 14. That was not disturbed at all by *Owen Equipment & Erection Co. v. Kroger*, 437 U.S. 365 (1978). It involved the very different question whether plaintiff may amend to state a claim directly against a third-party defendant who has been brought into the case by an original defendant.

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protect their interests in federal litigation brought by others." Oakley, *Recent Statutory Changes in the Law of Federal Jurisdiction and Venue: The Judicial Improvements Acts of 1988 and 1990*, 24 U.C.Davis L.Rev. 735, 765 (1991). But the new statute applies only to cases commenced after December 1, 1990, and thus has no application here.

[18] The Eleventh Amendment is not a barrier. Even if that immunity were otherwise applicable, it can be waived by a state and surely was waived here where Mississippi never objected to the third-party complaint, sought affirmative relief in its response, and represented to this Court that the district court was an appropriate alternative forum so that this Court should deny, as it did, Louisiana's motion for leave to file a bill of complaint here.

> It had been well settled before Owen Equipment that there is ancillary jurisdiction over the claim by the original defendant against the third-party defendant, and that there need be no independent jurisdictional grounds for such a claim if there was diversity between the original parties or if plaintiff's claim against the original defendant raised a federal question. This is still clearly the law. Such a claim, the Court said in Owen Equipment, "always is" ancillary.

WRIGHT, FEDERAL COURTS 515 (4th ed. 1983)[19]

The final issue that is raised by the question formulated by the Court is whether the fact that the Fifth Circuit has held that the land in question is in Louisiana means that the district court in Mississippi lacked power to exercise jurisdiction over it. This argument would rely on the statement in *Durfee v. Duke*, 375 U.S. 106, 115 (1963), that "courts of one State are completely without jurisdiction directly to affect title to land in other States." On that view, if the Mississippi district court had found that Stack Island is in Mississippi and if that decision had been affirmed, the district court would have had jurisdiction and the judgment would bind all parties to the suit, but if the court (or a higher court) found that the land was on the Louisiana side of the boundary, then the

[19] This result would not be changed by the 1990 statute, even if it were applicable, which it is not. See note 17 above. 28 U.S.C. § 1367(b) codifies the *Owen Equipment* rule by providing that in a diversity action "the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14 . . . of the Federal Rules of Civil Procedure," but with that exception supplemental jurisdiction under § 1367(a) extends fully to claims against third-party defendants.



Mississippi district court would be without jurisdiction and its judgment would be a nullity.

The literal language of *Durfee* supports such a result. This was the view taken by Louisiana in its unsuccessful attempt to persuade this Court to rehear its denial of leave to file in 1988. At page 9 of its Brief in Support of Petition for Rehearing, Louisiana said that "a judgment by the District Court that Island No. 94 is in Louisiana would not bind Mississippi nor necessarily the numerous private parties involved." (Pet. for Cert. App. 96a)[20] See also the dissent from denial of the motion for leave to file. *Louisiana v. Mississippi*, 488 U.S. 990, 991 (1988).

We respectfully submit that it cannot be the law that the jurisdiction of a district court turns on what result it reaches on the merits of a dispute that is before it. Consider how that would apply to the facts of the *Durfee* case itself. In that case the Durfees sued in state court in Nebraska to quiet title to certain bottom land in the Missouri River. Duke appeared and fully litigated the issue, arguing among other things that the land was in Missouri and that the Nebraska courts lacked jurisdiction. The Nebraska courts found that the river course had been changed by avulsion and held that the land was in Nebraska and therefore belonged to the Durfees. Two

[20] Louisiana also had taken this view in the district court. In its memorandum in support of its motion for separate trial of the interstate boundary issue, Louisiana said: "The determination of the legal boundary between the states by the Court will determine the limits of the jurisdiction of the Court, and may result in a determination that the ownership of the property in question is outside the limits of the Court's jurisdiction." (J.A. 34)

months later Duke brought a suit to quiet title to the same land in a state court in Missouri. This Court held unanimously that the Missouri courts (and the federal court to which the Missouri case was removed) were required to give full faith and credit to the Nebraska judgment.

Suppose, on the facts of that case, that the Nebraska courts had held that the change in the Missouri River was the result of accretion rather than avulsion and that the land was therefore in Missouri. On the argument now being considered, they would have been acting without jurisdiction, because it would now be established that the land was in another state. The Nebraska judgment, on this view, would be a nullity, and the Durfees would have been free to defend Duke's Missouri action and assert again that the land was in Nebraska.[21]

That cannot be the law. If a court has power to decide which state the land is in, it must have power to decide either way. It cannot be that a judgment is entitled to full faith and credit if the court decides one way but is a meaningless act, without legal effect, if the court reaches the other decision. As this Court said in *Underwriters National Assurance Co. v. North Carolina Life & Acc. & Health Ins. Guar. Ass'n*, 495 U.S. 691, 705 n.11 (1982), *Durfee* established "the rule of jurisdictional finality" and "the *Durfee* Court explicitly refused to recognize an exception to the rule of jurisdictional finality for cases involving real property over which the State claims exclusive jurisdiction."

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[21] And if the Durfees prevailed on that argument, and the Missouri courts agreed with them that the land was in Nebraska, that judgment also would have been a nullity.



The statement in *Durfee* that "courts of one state are completely without jurisdiction directly to affect title to land in other States," 375 U.S. at 115, is sensible enough in the context of the cases on which it is based. The cases cited in support of this statement in note 14 of *Durfee*, as well as those cited in note 11 of *Underwriters*, are all cases in which a probate court or a divorce court or an equity court in one state purported to adjudicate title to land that was unquestionably in a second state. Those cases are quite different from cases in which the court must decide whether land is or is not within its territorial jurisdiction. As the Court said in *Durfee* itself:

> Courts of one State are equally without jurisdiction to dissolve the marriages of those domiciled in other States. But the location of land, like the domicile of a party to a divorce action, is a matter "to be resolved by judicial determination." . . . The question remains whether, once the matter has been fully litigated and judicially determined, it can be retried in another State in litigation between the same parties. Upon the reason and authority of the cases we have discussed, it is clear that the answer must be in the negative.

375 U.S. at 115.

That is the principle that should govern here. The location of Stack Island has been fully litigated and judicially determined in a proceeding in which both of the states and all of the private parties concerned took part. The rule of jurisdictional finality means that this determination is binding on all of them. The determination will have been made by the highest court in the land. It would make a nonsense of the judicial process if this long litigation were now to amount to nothing because the courts decided the substantive issue put to them one way rather than the other.

## CONCLUSION AND PRAYER

The judgment of the Fifth Circuit should be reversed. Judgment should be rendered that Stack Island lies in Mississippi and that the boundary is correctly fixed by the trial court's judgment. Alternatively, the cause should be remanded to the trial court for findings with respect to the location of the boundary thalweg on the date Louisiana was admitted to the Union or when Stack Island was first known to exist.

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